

INITIAL STATEMENT OF REASONS

The Public Employment Relations Board (PERB or Board) first adopted regulations addressing agency fee collection issues in 1989, with the adoption of Subchapter 8, Article 1 of Chapter 1 (sections 32990 through 32997). At that time, the regulations only affected parties covered by the Educational Employment Relations Act (EERA)¹ and the Ralph C. Dills Act (Dills Act).² In crafting the initial regulations, the Board explained that it was required to follow the holdings of the U.S. Supreme Court in Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 US 292, as well as other significant cases followed by Hudson.

Since 1989, the case law, both in the federal courts and before PERB, has further evolved. However, while these regulations have been updated as agency fees were authorized under additional statutes and as PERB's jurisdiction was extended to cover additional public sector collective bargaining statutes, no substantive amendments have been adopted.

Based on the developments in case law since 1989, as well as extensive comments received from interested parties, PERB now proposes to adopt the changes summarized below. The focus of the changes is to provide greater clarity, especially with respect to the distinction between objections to payment of nonchargeable expenses and challenges to the calculation of the chargeable and nonchargeable expenditures. The amendments also seek to clarify aspects of the notice and escrow requirements, and to eliminate unnecessary regulations, while updating the regulations consistent with current case law in this area.

In section 32990, subsections (a) through (g) would be deleted. The definitional provisions to be deleted simply repeat information already contained in the statutes and reiterate citations also contained in the authority and reference for the section. The remaining language of this section would be revised to make usage of terms more consistent throughout the agency fee regulations.

Section 32991 would be deleted because it simply repeats information concerning the amount of agency fees contained in the statutes.

Section 32992(a) is modified to clarify the obligation of the exclusive representative regarding the content of the notice to agency fee payers. The exclusive representative is obligated to provide each nonmember paying a fee information regarding the amount of the fee. This requirement is consistent with the obligation under the National Labor Relations Board (California Saw & Knife Works (1995) 320 NLRB 224). Language requiring that the nonmember receive the notice is deleted. In addition, section 32992(a) requires that the exclusive representative provide for a procedure to object and a procedure to challenge. The distinction between objecting to paying for nonchargeable expenditures and challenging the exclusive representative's calculations of what is chargeable is blurred in the present regulations. Section 32992(b) is amended to give a union the option of having its expenditures audited or giving a nonmember the opportunity to independently verify the validity of the

¹ EERA is codified at Government Code section 3540 et seq.

² The Dills Act is codified at Government Code section 3512 et seq.

exclusive representative's spending claims. However, the amendment to section 32992(b) specifies that the option to provide an unaudited financial report applies only to exclusive representatives whose annual revenues are less than \$50,000. The dollar amount is based on the ruling in Harik v. California Teachers Association (9th Cir. 2003) 326 F.3d 1042 (Harik), and that decision is added to the reference for this section. The language of section 32992(c) is modified in an attempt to clarify, rather than change, when the agency fee notice must be provided, and the relationship of the timing of the notice to the escrow requirements of section 32995.

The present section 32993 would be deleted. The deleted provision requires that the exclusive representative's financial report contain information also required in the notice. Duplication of the information serves no purpose. Proposed new section 32993 requires an exclusive representative to provide a procedure for nonmembers to object to payment of the portions of the fee used for nonchargeable expenditures. As noted above, this requirement is not clearly distinguished in the present regulations from the right to challenge the calculation of the chargeable and nonchargeable expenditures. The proposed new section also clarifies the requirements for the procedure, including the requirement that the procedure allow at least 30 days following the notice for the filing of an objection.

Section 32994 is amended to clarify the right of an agency fee payer to challenge the determination of chargeable expenditures. The revisions delete the misleading use of the term "objector" that is normally used to refer to one who only objects to the spending of his/her fee on nonchargeable expenditures. The amendments clarify various aspects of the required procedures, including the requirement that the procedure allow at least 30 days following the notice for the filing of a challenge.

Revisions to section 32995 clarify the escrow requirements for the exclusive representative to cover both objectors and challengers.

One conforming change in language is proposed for section 32996.

In section 32997, only the Authority section has been modified, to include a reference to Harik that relates to whether the financial statements contained in the notice must be audited (see regulation 32992(c)(2)).